No. 85-701

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,
Appellant,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
Appellee.

On Appeal from the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF JOSEPH M. SCHEIDLER AND THE PRO-LIFE ACTION LEAGUE, INC. IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

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In this case, the Court of Appeals for the First Circuit determined that non-profit, ideological corporations should not be required to endure the burden and expense of forming a separate, segregated fund ("PAC") in order to engage in independent expenditures on issues pertinent to an election for federal office. The arguments which *amici* intend to bring before this honorable Court

are intended to give added support for this holding by demonstrating how the FEC's application of Sec. 441b in a case similar to the one at bar is acting as a virtual prohibition on political speech by a non-profit, ideological corporation.

Although the *amici* are closely allied in many ways to the position of the appellee Massachusetts Citizens for Life, they do not believe that either party will adequately address the critical issue of whether Section 441b of the Federal Election Campaign Act can be constitutionally applied against a corporation, like the League, that, for financial and organizational reasons, has elected not to organize itself to include a large staff or formal membership rolls. This issue is important because, under the FEC's enforcement of the Section 441b, nonprofit, ideological corporations like the League are prohibited from making independent expenditures to communicate to anyone other than their staff, directors and members on issues relevant to a campaign for federal office. If a corporation of this type desires to communicate beyond this limited sphere, the FEC's enforcement policies effectively require it to form a separate segregated fund (PAC), and to limit solicitation for such a fund to the same limited category—staff, directors and members—to which the corporation is entitled to directly communicate.

In the case before this Court, the Appellee, in the interest of avoiding further litigation, bowed to the FEC's policy and created a membership class as well as a separate segregated fund. Amicus Pro-Life Action League, however, would be forced to change its entire corporate structure, which is now highly centralized, to accommodate the creation of formal membership rolls to which it would be free to communicate and solicit for its PAC. Thus, the Pro-Life Action League cannot utilize the "PAC" option to exercise its First Amendment rights during the course of a federal election campaign without

sacrificing the form of corporate structure—highly centralized with very low overhead—which has been deliberately chosen as the form best suited to carry out its unique corporate mission. These arguments, *amici* respectfully submit, are important to proper understanding of the delicate balance that was articulated by the Court of Appeals between First Amendment rights and the legitimate governmental interest in regulation of campaign finances.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF JOSEPH M. SCHEIDLER AND THE PRO-LIFE ACTION LEAGUE, INC. IN SUPPORT OF APPELLEE

INTEREST OF THE AMICI

Joseph M. Scheidler is Executive Director of the Pro-Life Action League, Inc (the League), a non-profit, non-membership, public interest organization dedicated to preserving the sanctity of human life, including that of the unborn. During 1984, the League spent $500.00 to protest the position on abortion taken by the Democratic candidates for President and Vice-President. On January 31, 1985, the Federal Election Commission (FEC) found reason to believe that the League and Mr. Scheidler had

violated Section 441b of the Federal Election Campaign Act. 2 U.S.C. Sec. 441b (1982). This finding is presently being litigated before the FEC. *In re Pro-Life Action League, Inc.*, MUR 1826.

The initiation of litigation against Joseph M. Scheidler and the League for the expenditure of $500.00 to protest a candidate's well-known stand on an issue of major public importance illustrates the breadth with which the FEC is applying Section 441b against non-profit, ideological organizations and the length to which it will go to enforce that interpretation. This application of Section 441b against such non-membership, non-profit, ideological organizations strangles the First Amendment liberties of these organizations and may well force them to adopt a radical alteration in their corporate structure, or preclude them from participating altogether in the area of political activity. The interests of the *amici* will be served by affirmance of the ruling of the First Circuit Court of Appeals, upholding the rights of non-profit, educational corporations to exercise their First Amendment rights in the context of elections for federal office.

SUMMARY OF ARGUMENT

The FEC portrays its case against Massachusetts Citizens For Life (MCFL) as one in which reasonable people could differ on the possibility for corruption of elections. The FEC suggests that the Court of Appeals' striking of the statute is an improper "second-guessing" of the FEC's mandate. The facts of this case, however, belie this caricature. This Court's decisions over the past decade compel the conclusion that independent expenditures by a non-profit, ideological organization to disseminate truthful information about the voting records of federal candidates are pure speech, protected by the First Amendment, which cannot be regulated in the manner advanced by Section 441b.

Restricting non-profit ideological corporations from communicating on issues relevant to a federal election to anyone other than the formal members of the corporation is an unwarranted intrusion upon the First Amendment rights of the corporation, and of those who are interested in receiving the corporation's message. No substantial governmental interest in averting corruption or its appearance is served by restricting speech to such an absurdly small audience. Citizens who contribute to a non-profit, ideological corporation are in no danger of having their funds diverted to political causes with which they are not in agreement. In addition, the governmental interests which may apply in the case of direct contributions to candidates and political committees are simply not present in the case of independent expenditures such as those at issue in this case, and those typically made by other non-profit, ideological corporations.

Even if there were a governmental interest sufficient to justify some measure of regulation of such independent expenditures, Sec. 441b and FEC regulations are not narrowly tailored to serve those interests. The FECA, on its face and as applied, sweeps in all forms of corporations, including those which have consciously chosen not to organize themselves with formal membership rolls. The burdens of establishing a membership with which the corporation may legitimately communicate are substantial and serve no legitimate governmental interest, since the membership rolls are likely to be duplicative of the lists of supporters and constituents which are currently maintained by the ideological corporation for its educational purposes.

The availability of a separate, segregated fund (PAC) as a vehicle for independent expenditures does not cure the defects of Sec. 441b as applied to non-profit, ideological corporations. The PAC requirement serves no substantial governmental interest, since, in the case of the ideological corporation, the PAC is simply a duplication

of the existing corporate structure. The burdens that forming a PAC places upon a corporation are substantial. Most importantly, in the case of the corporation without formal membership rolls, there is no realistic opportunity to "speak through" a PAC, since solicitation for the PAC is limited to those who meet technical membership requirements. Thus, the combination of Sec. 441b's prohibition on political communications beyond the membership class, and the limitation of PAC solicitation to the membership class, acts as an absolute bar on independent expenditures by corporations such as the *amicus*, Pro-Life Action League. In addition, these regulations violate the constitutional restrictions on compelled disclosure of unpopular political association.

The application of section 441b to such non-profit, ideological organizations disregards the fundamentally different nature of such organizations from that of traditional, commercial corporations and unions and the corresponding lack of corruption of candidates and danger of deception of citizens. It is therefore unconstitutionally overbroad. It represents regulation for the sake of regulation.

ARGUMENT

I. INTRODUCTION

Joseph M. Scheidler, Executive Director of the Pro-Life Action League, Inc. (League), is a graduate of Notre Dame University (B.A. Journalism) and Marquette University (M.A. Communications). He has worked for a number of newspapers and magazines, including the South Bend *Tribune* and *Our Sunday Visitor*. He has taught journalism at Notre Dame and theology at Mundelein College. He was formerly executive director of the Illinois Right to Life Committee and of Friends for Life.

In 1980, Joseph Scheidler formed the Pro-Life Action League, Inc. (League) for "the promotion of the social good and welfare of the people of the community . . .

[and] assistance in promoting the rights of the unborn and defenseless human beings . . ." The League is a non-profit, public interest corporation. The League has three full-time paid staff people, consisting of Joseph Scheidler, his wife, Ann Scheidler, and an executive secretary, Barbara Menes. These three also make up the Board of Directors. There are no members or stockholders within the definitions set forth in the Federal Election Campaign Act (FECA), 2 U.S.C. Sec. 441b (1982). The League does not require any set amount of dues to be a "member"; a simple request to be on the League's mailing list suffices. The League's corporate structure was organized in such a form as to maximize the centralization of control of policy-making authority in the executive director and to minimize overhead and administrative costs.

The League was "designed expressly to participate in political debate", and, as a result, is "quite different from the traditional corporations organized for economic gain." *Federal Election Commission v. National Conservative Political Action Com.*, 105 S.Ct. 1459, 1470 (1985) (*"NCPAC"*). The purpose of forming the League was similar to that stated by this Court, in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981).

> [B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost . . . Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

Id. at 294, 295 (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). "[G]roup association is protected because it enhances effective advocacy." *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (cit. omit.)

The main activity of the League is to demonstrate, speak, picket, and educate on behalf of the unborn and

against abortion. Mr. Scheidler regularly engages in public speaking, having taken 159 trips to various parts of the country in 1985 and 25 trips so far in 1986. The League works with other activist groups around the country and maintains a telephone hotline, which describes the recent and upcoming activities in which the League is engaged. The League has a yearly budget of approximately $120,000. All fundraising is now undertaken by the three staff members. The League does not contribute to or endorse any political candidate to any election, and has never done so.

Mr. Scheidler initiated a protest against Mrs. Ferraro in response to to what he considered to be her inaccurate and erroneous statements on the history and status of Catholic teaching on abortion and the sanctity of human life. In July, 1984, in order to encourage protest of the pro-abortion position of the Democratic candidates for President and Vice-President, Mr. Scheidler sent a letter to approximately 300 persons or groups who were well-known to, and allied with, the League. These recipients were neither members of the "general public", nor members of the League within the definition of Section 441b. 2 U.S.C. Sec. 441b(b)(2)(A) (1982). The cost of preparing and sending this letter, including postage, was $108.20. The League also spent approximately $200.00 on fliers, long distance telephone calls, and for signs to protest Ferraro's position on abortion. Finally, the League spent $238.00 for travel to participate in a picket of Mrs. Ferraro in New York.

In October 1984, attorneys for the National Abortion Rights Action League (NARAL) filed a complaint with the FEC against the League and Mr. Scheidler. On January 31, 1985, the FEC found reason to believe that the League and Mr. Scheidler had violated Section 441b.

The application of Section 441b to independent expenditures by the League, MCFL, and similar ideological

corporations serves none of the original purposes of the Act and suppresses free speech in violation of the First Amendment. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) *(Berkeley)*, *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982) *("NRWC")*, *Federal Election Commission v. National Conservative Political Action Committee*, 105 S.Ct. 1459, 1468 (1985) *("NCPAC")*. In *NCPAC*, this Court left open the question "whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office." *Id.* at 1468. That question, as applied to independent, uncoordinated expenditures by a non-profit, ideological corporation, is now presented to this Court. The confluence of the principles enunicated in these cases necessitates a negative answer to that question and the affirmance of the decision of the Court of Appeals below.

II. SECTION 441b CANNOT CONSTITUTIONALLY BE APPLIED TO INDEPENDENT EXPENDITURES BY AN IDEOLOGICAL CORPORATION TO COMMUNICATE ITS POSITION ON ISSUES THAT ARE CONTESTED IN A FEDERAL ELECTION.

A. The FEC Must Demonstrate That The Application Of Section 441b To Independent, Uncoordinated Expenditures Of Ideological Corporations Serves A "Sufficiently Strong Governmental Interest" And Is "Narrowly Tailored To Prevent The Evil That May Legitimately Be Regulated."

Independent, uncoordinated expenditures "produce speech at the core of the First Amendment." *Federal Election Commission v. National Conservative Political Action Committee*, 105 S.Ct. 1459, 1467 (1985) *(NCPAC)*. The expenditure of money by commercial corporations to publicize views on a state constitutional amendment was held to be speech "at the heart of the First Amendment's protection" in *First National Bank of Boston v. Bellotti*,

435 U.S. 765, 776 (1978). Only a "sufficiently strong governmental interest" can justify regulation of such expenditures, and that regulation must be "narrowly tailored to the evil that may legitimately be regulated." *NCPAC*, 105 S.Ct. at 1468-69. "[P]reventing corruption or the appearance or corruption" are the only governmental interests that may justify regulations on such expenditures. *Id.* at 1469. Thus, in order to be constitutionally applicable to independent expenditures, by non-profit, ideological corporations, Section 441b must be "narrowly tailored" to prevent corruption or the appearance of corruption flowing from expenditures by such organizations.

B. Section 441b Cannot Be Constitutionally Applied To Communications By A Non-Profit, Ideological Corporation On Issues Relevant To A Campaign For Federal Office, Especially When Those Communications Are Made To Non-Members Who Support The Corporation's Educational Goals.

1. *There is no substantial governmental interest in limiting independent, educational, and political communications of non-profit, educational corporations to the membership of those corporations.*

Section 441b prohibits "any national bank, or any corporation organized by authority of any law of Congress" from making "a contribution or expenditure in connection with any election to any political office." In order for corporations and unions to make such expenditures, Section 441b requires them to establish a "separate segregated fund," commonly called a political action committee (PAC). 2 U.S.C. Sec. 441b(b)(2)(C), Sec. 431(4)(b). In turn, the FECA prohibits the PAC from soliciting contributions "from persons other than its stockholders and their families and its executive and administrative personnel and their families." *NWRC*, 459 U.S. at 202, 2 U.S.C. Sec. 441b(b)(4)(A). The PAC, however, is allowed to solicit funds "from members of the

sponsoring corporation." *Id.*, 2 U.S.C. Sec. 441b(b)(4)(C). "The effect of this proviso is to limit solicitation by non-profit corporations to those persons attached in some way to it by its corporate structure." *NRWC*, 459 U.S. at 202.

The FECA and its predecessors, the Tillman Act of 1907, ch. 420, 34 Stat. 864, the Federal Corrupt Practices Act of 1925, 43 Stat. 1070, and the Labor Management Relations Act of 1947, 61 Stat. 136, were created with traditional, profit-making, commercial corporations and unions as their object. *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 208-10 (1982), *United States v. United Auto Workers*, 352 U.S. 567, 570-585 (1957) (*"UAW"*), *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 112-121 (1948) (*"CIO"*). They had two fundamental purposes. First, they were enacted to ensure that "substantial aggregations of wealth amassed by the special 'advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions." *NRWC*, 459 U.S. at 207, *UAW*, 352 U.S. at 575. Second, these statutes were intended to protect shareholders and union members who have paid money into a commercial corporation "for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208, *CIO*, 335 U.S. at 115. These statutes were not enacted with independent expenditures by non-profit, ideological corporations in mind. *See* Brief of Amicus Curiae National Rifle Association In Support of Appellee.

In view of the original purposes of the FECA and its predecessors, there are no substantial, governmental interests in prohibiting (except for communications to the staff, directors and membership) independent expenditures by corporations such as the League and MCFL con-

cerning candidates and issues in federal elections. This Court has noted that the "hallmark of corruption"—dollars for political favors—is not present in the case of independent expenditures in support of candidates, even where those expenditures are made by wealthy PACs in support of specific candidates. *NCPAC*, 105 S.Ct. at 1469. Consequently, corruption or its appearance are much *less* present in the case of MCFL and the League, which have not endorsed candidates but only seek to inform citizens about a particular issue and where candidates stand on that issue.

> The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

NCPAC, 105 S.Ct. at 1469. Ideological organizations cannot discuss issues during the course of elections in an informative way without also discussing how those issues relate to candidates. The newsletter published by MCFL was informative and merely reported the voting record of candidates as they relate to the ideas for which MCFL exists.

> [T]he absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. Since there is no *quid pro quo*, there can be no substantial governmental interest in limiting this form of communication.

Due to the clear distinction which this Court has drawn between independent expenditures and direct contributions, this case must be distinguished from that which was presented to this Court in *National Right to*

Work Committee. Indeed, this Court's decisions from *Buckley* to *NCPAC* emphasize that this distinction is dispositive on the question of whether there is a substantial state interest in support of regulation. This case is further distanced from *NRWC* by the fact that MCFL, and even more so the League, are akin to "lone pamphleteers or street corner orators in the Tom Paine mold." *NCPAC*, 105 S. Ct. at 1467. Indeed, groups such as MCFL and the League advance viewpoints that some consider to be positively seditious—all the more reason to scrupulously examine the purported interest in the regulation of such speech.

In addition, ideological organizations which make independent expenditures to inform the public about candidates do not pose a reasonable threat of misusing funds for political purposes which have been provided to the corporation by persons opposed to those purposes. There are several reasons for this. The financial relationship of contributors to ideological organizations is usually limited to the cash or check that they unilaterally contribute in response to specific, public appeals. If they become disenchanted with the activities of the organization, they can easily stop all contributions and ties. Members of unions and corporations, in contrast, are often employees or stockholders who have a substantial, financial relationship with the corporation, including employment. That financial relationship cannot be easily severed whenever the member disagrees with how money is spent by the union or corporation, thus creating a substantial governmental interest in enforcing the separate, segregated fund requirement.

The functions of traditional unions and commercial corporations, and the purposes for which they might spend members' funds, are not as public, nor as clearly defined, as those of non-profit, ideological organizations. Like media corporations, ideological organizations "accomplish the same objective every day within the frame-

work of their usual protected communications." *Bellotti*, 435 U.S. at 781-82 n.17. Members of unions and corporations may not know whether the corporation funds the Sandinistas or invests in South Africa. Moreover, the choice to contribute to a particular candidate may reflect the personal preferences of the corporate or union heirarchy more than the interests of the members. The essential nature of ideological organizations and their difference from traditional profit-making corporations and unions demonstrate that no substantial governmental interest exists for prohibiting independent, uncoordinated expenditures by such groups.

2. *The restrictions of Section 441b are not narrowly tailored to prevent corruption or the appearance of corruption of federal elections.*

Even if the governmental interest in regulating corruption was found to justify some form of restriction on independent expenditures by a non-profit, ideological corporation, it is evident that Sec. 441b is not narrowly tailored to meet that interest. The present action against MCFL, and the pending action against the League, make this abundantly clear. In both cases, the FEC seeks to apply Sec. 441b's prohibition on corporate expenditures to communications which were directed in part to individuals and groups which, while not meeting the FECA's full criteria for membership, had clearly evidenced an allegiance and ideological affiliation with the goals of the corporation. Sec. 441b, therefore, is being used to limit political speech by a non-profit ideological corporation to an absurdly small category of persons: those with formal membership status in the corporation. Such a blanket restriction places a penalty upon efforts by the corporation to communicate with those who desire to hear the corporation's political message, but have not, for financial or other reasons, become formal "members" of the corporation. Sec. 441b creates a situation whereby *political* speech between a corporation and such an interested party actually receives *less* protection than speech on non-political matters. Such a scheme of regulation cannot be characterized as "narrowly tailored" to any governmental interest.

The impact of Sec. 441b is even more profound in the case of a corporation, such as the League, which has purposefully chosen not to have formal membership rolls. For such a corporation, Sec. 441b acts as an absolute prohibition on political speech, and thus, has not been narrowly tailored to take into account the interests of this type of corporation. Indeed, application of Sec. 441b in such circumstances constitutes an impermissible prior restraint on the exercise of free speech. *Talley v. California*, 362 U.S. 60 (1960), *Thomas v. Collins*, 323 U.S. 516 (1945).

For a variety of reasons, ideological organizations such as the League and MCFL typically do not invest the funds and manpower that would be required into building and sustaining membership rolls. Rather, they operate on limited funds, with expanding and contracting donor bases that fluctuate with the times and the headlines. Ideological organizations are supported because contributors share the goals of the organization, believe in its vision, and wish to further its work. Such organizations do not provide tangible benefits to contributors. It is the ideological identity of the organization which draws funds, not the contributor's financial or vocational commitment to the corporation, as in the case of commercial corporations and unions. This carries dangers of instability for the ideological organizations, but also mitigates any danger of corruption.

Nevertheless, in its actions against MCFL and the League, the FEC is effectively forcing these groups to create formal membership rolls as a price for speaking on issues connected with an election to federal office. The

FEC is enforcing this choice in two distinct ways. First, the FEC is attempting to restrict the audience of political speech by the League and MCFL to persons who are duly qualified as members. Second, in the event that the League and MCFL wish to communicate *beyond* this limited sphere, the FEC is attempting to require that the funds for such speech be separately solicited from the membership class. For an organization such as the League, which has no membership class that would be eligible to receive solicitations, this requirement is tantamount to an absolute prohibition on corporate political speech. (*See* Section C of this Brief).

Furthermore, even where a corporation is able to comply with the FEC's mandate to form a membership class and restrict communications to that class, the effort of doing so burdens the exercise of First Amendment rights by diverting funds from the corporation's educational program to the costs of administration. In the case of the League, it was to avoid this very problem that the incorporators declined to provide for a membership class. By prohibiting the League from communicating on issues in a federal election to persons who support the League's goals, the FEC is also infringing the rights of League supporters who may be too poor to pay dues on a regular basis, but may depend upon communications from the League in guiding their own voting and other political activity. Hence, the application of Sec. 441b to groups such as the League and MCFL threatens not only the free speech rights of these corporations, but also may chill the discussion of issues throughout the body politic.[1]

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[1] Congress and the FEC have made it abundantly clear that the membership class requirements for PAC solicitation and corporate political communication may not be satisfied by creating perfunctory or donation-only criteria for corporate membership. An incorporated membership organization or corporation without capital stock may make certain partisan communications to "its members and executive or administrative personnel, and their families." 11 C.F.R. Sec. 114.3(a)(2) (1985). The term "member" is defined as "all persons who are currently satisfying the requirements for membership in a membership organization" or corporation without capital stock. 11 C.F.R. Sec. 114.1(e). A person is not encompassed within this definition if the only requirement for membership is a contribution to a separate, segregated fund. In Advisory Opinion 1977-67, the FEC stated that "a person can only be considered a member of an organization if he or she knowingly has taken some affirmative steps to become a member of the organization . . . the membership relationship must be evidenced by the existence of rights and obligations vis-a-vis the corporation." A "predetermined minimum amount for dues or contributions" were considered a prerequisite to claiming the membership exception. *Id.* Consequently, the FEC's admonition that groups like MCFL and the League may remedy their difficulties with the Commission by "simply" forming PACs and membership classes severely understates the burdens that such steps may place upon a corporation which heretofore has had no membership class.

In limiting corporate political communications to those on formal membership rolls, and extending that limitation to all corporations, including ideological, non-profit corporations, Congress and the FEC have failed to recognize the differences between these corporations and the corporate bodies whose political activity was the real target of the FECA and its predecessors. This Court noted, in *NCPAC*, that ideological groups and associations, "designed expressly to participate in political debate, are quite different from the traditional corporations organized for economic gain." 105 S.Ct. at 1470. These differences substantially curtail the governmental interest in regulating the political speech of the ideological corporation. Because Congress and the FEC have failed to recognize these differences, and seek to apply Sec. 441b broadly to *all* corporations and *all* forms of activity that may be deemed remotely political, they have failed in their obligation to narrowly tailor this scheme of regulation to meet the government's interest in preventing corruption.

C. The Unconstitutionality Of Section 441b's Prohibition On Independent Expenditures By Non-Profit, Ideological Corporations Is Not Mitigated By The Option To Create A Separate, Segregated Fund.

In response to the argument that Section 441b impermissibly restricts the First Amendment rights of corporations, the FEC has contended that corporations are free to create a separate, segregated fund (PAC) to participate in elections for federal office. This argument fails because, in the case of non-profit ideological corporations, the "PAC option" creates substantial burdens upon the exercise of free speech, with no corresponding governmental interest sufficient to justify such burdens. Specifically, the PAC requirement mandates that the corporation devote substantial resources to the creation of a separate unit which effectively duplicates the function of the corporation. As already established, the governmental interests in preventing corruption and protecting the rights of the "unwilling contributor" are irrelevant to a non-profit corporation whose ideological stance is its primary and sole identity. Furthermore, in the case of a corporation without formal membership, such as MCFL prior to 1980, or the League, the PAC requirement acts as a *de facto* prohibition on independent expenditures. Finally, rather than serve the governmental interest in disclosure of political financing, the PAC requirement, when applied to controversial organizations such as the League and MCFL, violates the constitutional prohibition on compelled disclosure of political affiliation.

1. *The formation and administration of a PAC burdens the exercise of First Amendment rights.*

The requirement that non-profit ideological corporations form a PAC unduly burdens First Amendment rights by allowing the exercise of such rights *only* if the corporation is willing (and able) to devote the time, money, and personnel necessary to administer a PAC and to comply with the detailed record-keeping and reporting requirements to which PACs are subject. The creation and administration of a PAC requires knowledge of and compliance with the Act's extensive record-keeping and reporting requirements. The Act requires a PAC's treasurer to keep a record of all contributions received and expenditures made by the PAC. 2 U.S.C. Sec. 432(c); 11 C.F.R. Sec. 102.9. The records must include, for example, the name and address of each person who makes a single contribution in excess of $50, and each person whose aggregate contributions during the calendar year exceed $200. *Id.* Sec. 432(c)(2), 432(c)(3), 11 C.F.R. Sec. 102.9(a). The records must also include the name and address of *every* person to whom *any* expenditure is made, as well as the date, amount and purpose of the expenditure. *Id.* Sec. 432(c)(5); 11 C.F.R. Sec. 102.9(b). In addition to expenditure records, the PAC's treasurer must retain a receipt or invoice from the payee or a cancelled check given to the payee for each single expenditure in excess of $200. *Id.* Sec. 432(c)(5); 11 C.F.R. Sec. 102.9(b).

The reporting requirements to which PACs are subject are similarly intrusive. *See* 2 U.S.C. Sec. 434(b); 11 C.F.R. Part 104. All PACs are required to file with the FEC detailed financial reports for each quarter in which contributions or expenditures are received or made. *Id.* Sec. 434(a)(4)(A)(i). In addition, "pre-election reports" must be filed within 12 days of certain elections. *Id.* 434(a)(4)(A)(ii), and "post election reports" must be filed within thirty days after a general election. *Id.* Sec. 434(a)(4)(A)(iii). The Act contains detailed requirements concerning the contents of such reports. 2 U.S.C. Sec. 434(b); 11 C.F.R. Sec. 104.3.

Aside from disclosing the dollar amount of all receipts and disbursements in various categories, reports must also disclose the identities of certain persons or entities who have dealt with the PAC. 2 U.S.C. Sec. 434(b); 11 C.F.R. Sec. 104.3(b)(3), (b)(4). The reports must disclose, for instance, the identity of each person

whose individual or aggregate contributions to the PAC for the reporting period or calendar year exceed $200, 2 U.S.C. Sec. 434(b)(3); 11 C.F.R. Sec. 104.3(b)(3); each person to whom the PAC makes single or aggregate expenditures in excess of $200 during the reporting period or calendar year, together with the date, amount and a statement of why the expenditure was made, 2 U.S.C. Sec. 434(b)(5); 11 C.F.R. Sec. 104.3(b)(3); and each person to whom an independent expenditure in excess of $200 is made by the PAC, together with a statement indicating whether the expenditure is in support of or opposition to a particular candidate. 11 C.F.R. Sec. 104.3(b)(3)(vii)(B). In the case of independent expenditures of $1,000 or more made within 20 days of an election, a separate report of the expenditure must be filed within 24 hours after it is made. 11 C.F.R. Sec. 104.4(b) (1985).

In addition to the Act's record-keeping and reporting requirements, the fund-raising activities of a PAC and the organization which creates it are closely regulated. In the case of non-stock corporations and membership organizations, funds may be solicited only from the corporations' or organizations' "members." 2 U.S.C. Sec. 441b(b)(4)(C); 11 C.F.R. Sec. 114.7(a). Moreover, non-soliciting partisan communications in connection with an election must also be restricted to "members." *See* 11 C.F.R. Sec. 114.7(h); *cf.* 2 U.S.C. Sec. 441b(b)(2)(A).

Without detailing further the regulatory harnesses placed upon PACs (*e.g.*, deadlines for depositing contributions; mandatory banking accounts, etc.), it should be obvious that both corporate and individual First Amendment rights are seriously infringed by the Act's requirement that group speech in corporate form be stilled unless an organization is willing to create, and has the extensive financial, administrative and manpower resources necessary to administer, a PAC.

2. The limitations on PAC solicitation make it impossible for a non-profit, non-membership corporation to effectively operate a PAC, and thus act as an absolute ban on political speech pertaining to federal elections, by such corporations.

In addition to the requirements on reporting and record-keeping, the FECA closely regulates the fund-raising activities of a PAC. Solicitations for the PAC, as well as non-soliciting partisan communications in connection with an election, are limited to members of the corporations. *See* 11 C.F.R. Sec. 114.7(a), (h). In the case of MCFL, the PAC requirement has caused the corporation not only to undertake the burden and expense of operating a PAC, but has also forced MCFL to convert its status to that of a membership corporation. There is nothing in the record to support the FEC's assumption that this process caused no burden for MCFL; indeed, assuming full compliance by MCFL with the FECA, it is difficult to imagine how this conversion process could have been anything other than burdensome.

In the case of corporations which are *not* willing or able to form membership rolls, however, the FECA's limitations on solicitation and communication do far more than create a burden on corporate speech: they threaten to silence that speech altogether. A corporation such as the League, which has deliberately chosen a non-membership structure to best advance the goals of the corporation, would be severely affected by reversal in this case.

After unsatisfactory experiences as the head of several organizations in promoting his own special brand of pro-life activism, Mr. Scheidler, along with his wife and his secretary, organized the Pro-Life Action League. Although the League has thousands of supporters, the articles of incorporation and by-laws severely restrict membership. A large, open membership, even if restricted to pro-life supporters, does not suit the League's corporate purpose. That purpose is to promote direct ac-

tivism: picketing, speaking, and, at times, acts of civil disobedience. No "membership" is necessary to carry out these purposes; those sufficiently motivated to participate along with Mr. Scheidler will do so regardless of their status in the corporation. Moreover, due to the controversial nature of Mr. Scheidler's activity, it is mutually beneficial to Mr. Scheidler *and* to his supporters to keep formal ties to a minimum. Mr. Scheidler does not aspire to represent a "membership", but only to represent a cause.

As such, the directors' choice to operate the League as a non-membership corporation is a conscious exercise of a First Amendment associational freedom. Section 441b abridges that freedom by effectively forcing the League to choose between relinquishing one of two fundamental rights under the First Amendment: its right to communicate on issues relevant to a campaign for federal office, and its right to exercise its associational freedom in the form of a non-membership corporation. The threat to associational freedom is real, because the definition of "member" is limited by the FEC to a class of persons with defined "rights and responsibilities vis-a-vis the corporation." FEC Advisory Opinion 1977-67; 11 C.F.R. Sec. 114.1(e). The League's choice to operate without such a defined class of persons thereby threatens the League's right to engage in political speech.

3. *Requiring the formation of a PAC as a vehicle for corporate political speech violates the right against compelled disclosure of organizations that espouse unpopular causes and of the persons who support them.*

As this Court has recognized, the FECA's reporting requirements place serious burdens on the exercise of constitutional rights: "we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First

Amendment." *Buckley v. Valeo*, 424 U.S. at 64 (and cases cited). The FECA's compelled identification of certain individuals who contribute to or receive funds from a PAC, 2 U.S.C. Sec. 434(b), are precisely the sorts of disclosure requirements which cast a chill upon First Amendment speech and associational rights. The loss of anonymity resulting from such disclosure requirements may have a deterrent effect on those who would otherwise consider becoming linked to a cause (such as abortion) which is publicly viewed as unpopular and unorthodox. *See, e.g., Federal Election Commission v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982) (holding that the disclosure and record-keeping requirements of the Act are unconstitutional as applied to the Communist Party). This chilling effect not only abrogates the First Amendment rights of privacy and association for those individuals whose identities would be reported, but also interferes with the associational rights of the reporting organization whose ability to attract supporters may be reduced.

In several decisions, this Court has delineated the First Amendment limitations to "compelled disclosure", where regulations coerce disclosure, to the state, of private information of associations. *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), *Buckley v. Valeo*, 424 U.S. 1 (1976), *NAACP v. Alabama*, 357 U.S. 449 (1958). Statutes which compel disclosure "must survive exacting scrutiny." *Buckley*, 424 U.S. at 64. There must be a "subordinating interest of the State that is compelling," *Brown*, 459 U.S. at 91-92, and a "substantial relation between the governmental interest and the information required to be disclosed." *Id.*, *Buckley*, 424 U.S. at 64. Contributions to non-profit, ideological organizations who, in turn, make no contributions, but only independent expenditures, constitute political association, not contributions to candidates. "The Constitution protects against the compelled disclosure of

political associations and beliefs. Such disclosures can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Brown*, 459 U.S. at 91.

There are only three legitimate governmental interests in disclosure: (1) providing the "electorate with information 'as to where political campaign money comes from and how it is spent by the candidate", (2) deterring "actual corruption and avoid[ing]the appearance of corruption by exposing large contributions and expenditures to the light of publicity," and (3) gathering the data necessary to detect violations of the contribution limits." *Brown*, 459 U.S. at 92, *Buckley*, 424 U.S. at 66-68. Plainly, all these governmental interests relate to contributions, not independent, uncoordinated expenditures. None exists in this case.

Providing the electorate with "information as to where political campaign money comes from and *how it is spent by the candidate*" is not relevant to independent expenditures. Second, deterrence of corruption from contributions is similarly not relevant to independent expenditures. In *Buckley*, this Court recognized this interest as substantial only in the context of "the most generous supporters" of candidates. *Id.* at 67. Deterrence of the corruption of candidates in the context of independent expenditures by ideological organizations is simply not a substantial interest. Finally, since the preceding governmental interests do not apply to independent expenditures by a non-profit, ideological organization, the "gathering of data necessary to detect violations of the contribution limitations" cannot be relevant.

The FEC counters by citing this Court's dicta in *Buckley* that "[t]he corruption potential of these [independent] expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies." 424 U.S. at 81.

Subsequent to *Buckley*, this Court has made clear that independent expenditures, especially those by ideological corporations, have such a fundamentally different nature from candidate contributions that they are entitled to greater constitutional protection. *NCPAC*, 105 S.Ct. at 1469. Despite the dicta cited by the FEC, the Court in *Buckley* "found no tendency in [independent] expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption." *Id.* Although the FEC broadly claims to be protecting an informed electorate, this Court has stated that the governmental interests which justify disclosure are not in an informed electorate *per se* but are more appropriately limited to information which shows "where political campaign money comes from and how it is spent by the candidate," deters corruption by exposing large contributions and expenditures, and detects violations of contribution limits. This limited information will not be obtained by compelled disclosure of the contributions to non-profit, ideological groups who make only independent expenditures, and thus disclosure of information about such independent expenditures does not relate to the three interests which justify compelled disclosure.

Since such governmental interests do not exist in the context of this case, it is not necessary for MCFL or the League to make a "requisite factual showing" of harassment. *Buckley*, 424 U.S. at 69 (*citing NAACP v. Alabama*, 357 U.S. at 462). The burden is on the Government to show that "substantial governmental interests" exist for the disclosure, before MCFL or the League need to make a requisite factual showing. *Brown*, 459 U.S. at 92, *Buckley*, 424 U.S. at 69. Since no substantial governmental interest exists in requiring compelled disclosure of contributions to non-profit, ideological organizations who make independent, uncoordinated expenditures, compelled disclosure cannot be required of such organizations, like MCFL and the League.

D. There Is No Substantial Governmental Interest Which Justifies Requiring Non-Profit, Ideological Organizations To Register As "Political Committees."

There is no substantial governmental interest in applying Section 441b to independent, uncoordinated expenditures by non-profit, ideological organizations under Section 441b. Nevertheless, it might be argued that, in the alternative, organizations such as MCFL and the League should be regulated, and required to register, as "political committees" under Section 431 of the FECA. This argument can only be made with disregard for the settled principle that there must be "substantial governmental interests" to regulate, in any fashion, campaign finances. Since no such interests exist to apply Section 441b to such organizations, none exists to require their registration as political committees. To do so would constitute regulation of political expression merely for the sake of regulation.

In *Buckley v. Valeo*, this Court narrowly defined "political committee" and "expenditure", as it relates to such committees, to exclude ideological corporations like MCFL and the League. The Court feared that "political committee" could be "interpreted to reach groups engaged purely in issue discussion." *Buckley*, 424 U.S. at 79. The Court approved this narrow construction by lower courts. *Id.*

> To fulfill the purposes of the Act [the term]need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress.

Id. Moreover, the Court stated:

> [W]hen the maker of the expenditure is not within these categories—when it is an individual other than a candidate or a group other than a "political committee"—the relation of the information sought to the purposes of the Act may be too remote. To ensure that the reach of [Sec.] 434(e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of [Sec.] 608 (e)—to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.

Id. at 80. This narrow construction was adopted to avoid problems of unconstitutional vagueness. *Id.* at 77-78.

In this case, MCFL made independent expenditures to inform interested pro-life voters about the voting records of a number of candidates and to encourage voters to vote pro-life. These expenditures were not made to "expressly advocate the election or defeat of a clearly identified candidate"; nor was the spending "unambiguously related to the campaign of a particular federal candidate." If "political committee" and "expenditure" were construed more broadly than done in *Buckley*, it is hard to imagine any association of citizens who could join together to inform voters about their elected representatives without coming within the confines of the FECA. Such a construction would take the FECA far afield from its original, constitutional purpose of regulating the infusion of large accumulations of wealth by commercial corporations and labor unions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals below should be affirmed.

Respectfully submitted,

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